

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

CYNTHIA SCOTT,)	
)	INTERLOCUTORY
Employee,)	DECISION AND ORDER
Claimant,)	
)	AWCB Case No. 201512269
v.)	
)	AWCB Decision No. 16-0075
STATE OF ALASKA,)	
DEPARTMENT OF HEALTH AND)	Filed with AWCB Anchorage, Alaska
SOCIAL SERVICES)	on August 24, 2016
)	
Self-Insured Employer,)	
Defendant.)	

Cynthia Scott's (Employee) May 13, 2016 claim appealing the Reemployment Benefits Administrator ("RBA") designee's determination that Employee is not eligible for reemployment benefits was heard in Anchorage, Alaska on August 3, 2016, a date selected on June 15, 2016. Employee appeared, representing herself, with the assistance of Millie Johnsen, her sister. Attorney Daniel Cadra appeared and represented State of Alaska (Employer). No witnesses were called to testify. The record closed at the hearing's conclusion on August 3, 2016.

ISSUE

Employee contends the reemployment benefits decision denying eligibility should be overturned because Employee is not able to perform the physical requirements of the position she held when she was injured or positions she held in the prior ten years.

Employer contends the eligibility evaluation determination was supported by substantial evidence, was not an abuse of discretion, and should be upheld.

Did the RBA designee abuse her discretion when she found Employee ineligible for reemployment benefits?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1. On August 2, 2015, Employee injured her back, left leg, left arm, and head after falling at work. (Report of Occupational Injury, August 4, 2015).
2. On August 5, 2015, Employee began treatment for her injury at the Alaska Native Medical Center. Various physicians at this medical center have treated Employee, including Michael Michaud, PA-C (Certified Physician's Assistant. (Medical Summary, April 8, 2016).
3. On November 17, 2015, the Division of Workers' Compensation, Reemployment Benefits Section (Section) issued the parties notice that Karen Davis, a rehabilitation specialist with Davis Vocational Services in Kenai, Alaska, had been assigned to complete Employee's eligibility evaluation. The notice described the evaluation process and noted some resources available to Employee, including the phone number for the Section office and the Division's "Workers' Compensation and You" informational packet. (Referral Letter, November 17, 2015).
4. On January 14, 2016, PA-C Michaud predicted Employee would have the permanent physical capacities to perform the physical demands of the job descriptions provided for:

Nurse Assistant, D.O.T. 355.674-014
Administrative Assistant, D.O.T. 169.167-010
Sales Clerk, Food, D.O.T. 290.477-018
Sales Rep, Animal Feed, D.O.T. 272.357-010

PA-C Michaud indicated that Employee would *not* have the permanent physical capacities to perform the physical demands of the job description for:

Maintenance-Repairer Helper, Industrial, D.O.T. 899.684-022

PA-C Michaud indicated that Employee would not incur a permanent impairment from her injury. (Medical Records, January 14, 2016).

5. On January 15, 2016 PA-C Michaud indicated that Employee would have the permanent physical capacities to perform the physical demands of the job descriptions provided for:

Kitchen Helper, D.O.T. 318.687-010

(Medical Records, January 15, 2016).

6. On February 18, 2016, H. Donald Lambe, M.D., conducted a records review medical examination (EME) for Employer. Dr. Lambe indicated Employee was “fixed and stable with respect to [the work injury] with no rateable [sic] permanent impairment and no need for any physical restrictions . . . she is able to return to full duty employment without restrictions” and had reached medical stability. Dr. Lambe stated Employee’s records showed a cerebral aneurism but opined it was “certainly not related to the work injury.” Dr. Lambe stated that Employee would have no permanent partial impairment (PPI) from the work injury. (EME Report, February 18, 2016).

7. On February 22, 2016, Employer filed a Controversion Notice denying all benefits. (Controversion Notice, February 22, 2016).

8. On March 3, 2016, PA-C Michaud indicated that Employee would have the permanent physical capacities to perform the physical demands of the job descriptions provided for:

Administrative Clerk, D.O.T. 219.362-010

(Medical Records, March 3, 2016).

9. On March 28, 2016, rehabilitation specialist Davis issued a final reemployment benefits eligibility evaluation report and recommended Employee be found ineligible for reemployment benefits. Ms. Davis’s report considered opinions from PA-C Michaud and Dr. Lambe regarding Employee’s predicted physical capacities and permanent impairments. The report also noted Dr. Lambe’s finding that the cerebral aneurism was not related to the work injury, and stated that a neurologist’s opinion had not been sought for that reason. (Eligibility Evaluation Report, March 29, 2016).

10. On April 18, 2016, the RBA designee determined Employee is not eligible for reemployment benefits. The RBA designee based this determination on the reemployment specialists findings and documentation of medical findings that Employee would have the permanent physical capacities to perform the physical demands of the job she held at the time of injury and most of the jobs she held in the prior ten years. The determination was also based on the medical predictions that Employee would have no permanent impairment. (Eligibility Evaluation, April 18, 2016).

11. On May 13, 2016, Employee filed a workers’ compensation claim appealing the RBA designee’s determination that the employee is not eligible for reemployment benefits. (Workers’ Compensation Claim, May 13, 2016).

12. On August 3, 2016, the parties attended a hearing before the Alaska Workers' Compensation Board ("board") in Anchorage. Employee did not file evidence or argument concerning her reemployment claim prior to hearing or at hearing but testified that she did not have the physical capacities to perform the job she had at the time of injury or in the prior ten years. (Cynthia Scott; Record; Observation).

13. The parties did not dispute the job descriptions selected by the reemployment specialist. (Record; Observation).

14. PA-C Michaud's opinions were not co-signed or confirmed by his supervising physician. (Record; Observation).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

- 1) This chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
- 2) Workers' compensation cases shall be decided on their merits except where otherwise provided by statute

The Alaska Supreme Court has instructed the board of its duties with respect to every applicant for compensation who appears before the board:

[A] workmen's compensation board or commission owes to every applicant for compensation the duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law. *Richard v. Fireman's Fund Insurance Company*, 384 P.2d 445 (Alaska 1963), *cited with approval* in *Bohlmann v. Alaska Const. & Engineering*, 205 p.3d 319, n. 9 (Alaska 2009).

AS 23.30.005. Alaska Workers' Compensation Board.

. . .

(h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter Process and procedure under this chapter shall be as summary and simple as possible.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or

peculiar facts of the case, and inferences drawn from all of the above.” *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.041. Rehabilitation and reemployment of injured workers.

....

(d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings
.... Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee’s eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator’s part.

(e) An employee shall be eligible for benefits under this section upon the employee’s written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee’s job as described in the 1993 edition of the United States Department of Labor’s ‘Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles’ for:

(1) the employee’s job at the time of injury; or

(2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor’s ‘Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles.’

....

(f) An employee is not eligible for reemployment benefits if

....

(4) at the time of medical stability, no permanent impairment is identified or expected.

....

(r) In this section

....

(4) ‘physical capacities’ means objective and measurable physical traits such as ability to lift and carry, walk, stand or sit, push, pull, climb, balance, stoop, kneel, crouch, crawl, reach, handle, finger, feel, talk, hear, or see;

(5) ‘physical demands’ means the physical requirements of the job such as strength, including positions such as standing, walking, sitting, and movement of objects such as lifting, carrying, pushing, pulling, climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling, fingering, feeling, talking, hearing, or seeing;

(6) ‘rehabilitation specialist’ means a person who is a certified insurance rehabilitation specialist, a certified rehabilitation counselor, or a person who has equivalent or better qualifications as determined under regulations adopted by the department;

....

AS 23.30.395. Definitions. In this chapter,

(3) “attending physician” means one of the following designated by the employee under AS 23.30.095(a) or (b):

....

(D) a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy;

....

(32) “physician” includes doctors of medicine, surgeons, chiropractors, osteopaths, dentists, and optometrists

....

The board has previously considered whether a physician’s assistant may provide the opinions on which to base an eligibility determination under AS 23.30.041(e). Recent decisions follow the logic of *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249 (Alaska 2007) in holding that a psychologist may be a “physician” under the Act because the definition in AS 23.30.395 uses the word “includes” rather than more exclusive language, and was therefore understood to be a non-exclusive list. *Stackhouse v. C.G.G. Veritas Services Holding, Inc.*, AWCB Dec. No. 08-0178 (October 1, 2008), held that a physician’s assistant working under a medical doctor’s supervision was a “physician” for the purposes of AS 23.30.041(e) and (f). This result also allowed the Act’s definitions of “physician” and “attending physician” to be consistently interpreted. *Id. Foster v. TNT Painting & Contracting, Inc.*, AWCB Dec. No. 04-0273 (November 18, 2004), found that a physician’s assistant’s physical capacity predictions that were not reviewed, approved, or adopted by a supervising physician could not be relied upon to determine the employee did not have the requisite physical capacities. *Foster* found the RBA

designee abused her discretion by relying on a physician assistant's opinions that did not have the supervising physician's approval.

8 AAC 45.445. Activities to be performed only by the certified rehabilitation specialist. For purposes of AS 23.30.041(m), only the certified rehabilitation specialist assigned to a case may perform the following activities:

....

(3) selecting appropriate job titles in accordance with 8 AAC 45.525(a)(2);

(4) determining whether specific vocational preparation has been met and which job titles are submitted to a physician;

....

(9) making a recommendation regarding the employee's eligibility;

8 AAC 45.525. Reemployment benefit eligibility evaluations.

(a) If an employee is found eligible for an eligibility evaluation for reemployment benefits under AS 23.30.041(c), the rehabilitation specialist whose name appears on the referral letter shall

(1) interview the employee and the employer and review all written job descriptions existing at the time of injury that describe the employee's job at the time of injury;

(2) review the appropriate volume listed in (A) or (B) of this paragraph and, based on the description obtained under (1) of this subsection, select the most appropriate job title or titles that describe the employee's job; if the employee's injury occurred

(A) on or after July 2, 1998 but before August 30, 1998, the rehabilitation specialist shall use the United States Department of Labor's Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles (1981) (SCODDOT);

(B) on or after August 30, 1998, the rehabilitation specialist shall use the 1993 edition of the United States Department of Labor's Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCODRDOT) unless, under AS 23.30.041(p), the board has designated a later revision or version of that volume; and

(3) submit all job titles selected under (2) of this subsection to the employee's physician, the employee, the employer, and the administrator.

(b) When interviewing the employee the rehabilitation specialist whose name appears on the referral letter shall obtain descriptions of the tasks and duties for other jobs the employee held or for which the employee received training within 10 years before the injury, and any jobs held after the injury. The rehabilitation specialist shall

(1) exercise due diligence to verify the employee's jobs in the 10 years before the injury and any jobs held after the injury;

(2) review the appropriate volume listed in (A.) or (B) of this paragraph and select the most appropriate job title or titles that describe the jobs held and training received; If the employee's injury occurred

(A) on or after July 2, 1988 but before August 30, 1998, the rehabilitation specialist shall use the United States Department of Labor's Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles (1981) (SCODDOT);

(B) on or after August 30, 1998, the rehabilitation specialist shall use the 1993 edition of the United States Department of Labor's Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCODRDOT) unless, under AS 23.30.041 (p), the board has designated a later revision or version of that volume;

(3) identify all job titles identified under (2) of this subsection for which the employee meets the specific vocational preparation codes as described in the volume; and

(4) submit all job titles identified under (3) of this subsection to the employee's physician, the employee, the employer and the administrator; if the physician predicts the employee will have permanent physical capacities equal to or greater than the physical demands of a job or jobs submitted under this paragraph, the rehabilitation specialist shall conduct labor market research to determine whether the job or jobs exist in the labor market as defined in AS 23.30.041(r)(3).

8 AAC 45.530. Determination on eligibility for reemployment benefits.

(a) Within 14 days after receiving a rehabilitation specialist's eligibility evaluation report for an employee injured on or after July 1, 1988, the administrator will determine whether the employee is eligible or ineligible for reemployment benefits, or that insufficient information exists to make a determination on the employee's eligibility for reemployment benefits. The administrator will give the parties written notice by certified mail of the determination, the reason for the determination, and how to request review by the board of the determination.

(b) If the administrator determines the eligibility evaluation is not in accordance with 8 AAC 45.525, or the information in the board's case file is insufficient or does not support the eligibility recommendation, the administrator

(1) may not decide the employee's eligibility for reemployment benefits; and

(2) shall notify the employee, the employer, or the rehabilitation specialist

(A) what additional information is needed, who must submit the information, and the date by which the information must be submitted so eligibility can be determined; or

(B) that the administrator shall reassign the employee to a new rehabilitation specialist in accordance with 8 AAC 45.430.

The RBA's decision must be upheld absent "an abuse of discretion on the [RBA designee's] part." AS 23.30.041(d). Several definitions of "abuse of discretion" appear in Alaska law although none appear in the Alaska Workers' Compensation Act (Act). The Alaska Supreme Court has stated abuse of discretion consists of "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985). *See also Toheluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979). An agency's failure to apply controlling law or to exercise sound, reasonable and legal discretion may also be considered an abuse of discretion. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1013 (Alaska 2009); *Irvine v. Glacier General Construction*, 984 P.2d 1103, 1107, n. 13 (Alaska 1999); *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

The RBA designee fails to exercise sound, reasonable and legal discretion where he relies on a rehabilitation specialist's report which fails to consider statutorily mandated factors. *Irvine v. Glacier General Construction*, 984 P.2d 1103 (Alaska 1999). Where the board upholds an RBA designee's decision based on such a flawed report, the board commits legal error. *Id.* at 1107.

Abuse of discretion is also legislatively defined in the Administrative Procedure Act. AS 44.62.570 contains terms similar to those cited above, and expressly includes reference to a "substantial evidence" standard:

Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. . . . If it is claimed that the findings

are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence; or (2) substantial evidence In the light of the whole record.

An RBA designee's determination must be affirmed if supported by substantial evidence. *Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69 (Alaska 1993). Substantial evidence is that which a reasonable mind, reviewing the record as a whole, might accept as adequate. *Id.*

Konecky v. Cameo Wireline, Inc., 920 P.2d 277 (Alaska 1996), held in an eligibility case where there was no dispute over the correct job "title":

The language of AS 23.30.041(e) is clear – the Board must compare the physical demands of a specific job as found in SCODRDOT with the employee's physical capacities Under the express language of AS 23.30.041(e), medical evidence of eligibility must satisfy three requirements: First, the evidence must take the form of a prediction. Second, the person making the prediction must be a physician. Third, the prediction must compare the physical demands of the employee's job, as the U.S. Department of Labor describes them, with the employee's physical capacities. *Id.* at 281 and n. 9 (*quoting Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69, 73 (Alaska 1993)).

Employees are eligible for reemployment benefits under this analysis if a physician predicts their physical capacities are less than the physical demands for their job title as described in the SCODRDOT. *Konecky* at 281; *Yahara* at 73; *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526, 529 (Alaska 1993).

ANALYSIS

Did the RBA designee abuse her discretion when she found Employee ineligible for reemployment benefits?

In a workers' compensation claim to review the RBA designee's reemployment benefits eligibility evaluation, the evaluation may only be overturned if the designee abused her discretion in making the decision. AS 23.30.041(d). This is a high standard to meet. Employee did not file evidence or arguments prior to or at hearing indicating Employee would have "permanent physical capacities that are less than the physical demands" for all positions

Employee held in the ten years prior to her accident, nor indicating that Employee was permanently impaired or predicted to be permanently impaired due to her work injury.

A determination that Employee is not eligible must be supported by substantial evidence. *Yahara*. Employee is not eligible for reemployment benefits if at the time of medical stability a permanent partial impairment is not identified or expected. AS 23.30.041(f)(4). There is no medical evidence to indicate that Employee has any permanent impairment resulting from the work injury. Dr. Lambe's prediction that no PPI is expected is supported by PA-C Michaud's matching prediction. AS 23.30.041(f)(4). The record lacks any physician's prediction that Employee would lack the permanent physical capacities to perform the physical demands of the job she held at the time of injury and jobs she held in the prior ten years. AS 23.30.041(e). The analysis under either AS 23.30.041(e) or (f) would be sufficient to support the RBA designee's decision. The RBA designee's determination Employee is not eligible for reemployment benefits is based on substantial evidence.

The RBA designee's decision that Employee is not eligible for reemployment benefits is supported by substantial evidence, and is not an abuse of discretion. Therefore, Employee's claim will be denied.

Employee is advised that if new medical evidence is obtained to support her claim for reemployment benefits, she may request modification of this decision under AS 23.30.130 within one year of issuance by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050. *Richard; Bohlmann*.

CONCLUSIONS OF LAW

1. The RBA designee did not abuse her discretion when she found Employee ineligible for reemployment benefits.

ORDER

1. Employee's May 13, 2016 claim appealing the RBA designee's reemployment eligibility decision is denied and dismissed.

2. The RBA designee's April 18, 2016 determination is affirmed.

Dated in Anchorage, Alaska on August 24, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Henry G Tashjian, Designated Chair

/s/
Rick Traini, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of CYNTHIA SCOTT, employee / claimant v. STATE OF ALASKA, self-insured employer / defendant; Case No. 201512269; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 24, 2016.

/s/
Elizabeth Pleitez, Office Assistant